Supreme Court, U.S.
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No. 88-1524

In The

Supreme Court of the United States

October Term, 1988

JACK R. CREMEANS,

Petitioner,

vs.

CITY OF ROSEVILLE, a Municipal Corporation, CITY OF ROSEVILLE POLICE DEPARTMENT, THOMAS H. ASMAN, Chief of Police of the City of Roseville Police Department and member of the City of Roseville Retirement Board, ROSEVILLE POLICE OFFICERS' ASSOCIATION, a non-profit labor organization, THE CITY OF ROSEVILLE RETIREMENT BOARD, and T. VAN DAMME, MARGARET SPYBROOK, L. HAGGERTY and WILLIAM POWELL, Members of the City of Roseville Retirement Board, Jointly and Severally,

Respondents.

BRIEF IN OPPOSITION

TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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COUNTER-QUESTIONS PRESENTED

I.

DID PLAINTIFF, AS A MATTER OF LAW, FAIL TO PRESENT SUFFICIENT EVIDENCE TO CREATE A JURY QUESTION THAT HIS RIGHT TO PROCEDURAL DUE PROCESS WAS VIOLATED, BY MEANS OF A "SHAM HEARING" OR OTHERWISE?

II.

IS THE DECISION IN THE INSTANT CASE IN CONFLICT WITH A DECISION OF THE 7TH CIRCUIT COURT OF APPEALS AND IF SO DOES THIS "CONFLICT MERIT GRANT OF A PETITION FOR CERTIORARI IN THIS COURT"?

III.

IS THE DECISION IN THIS CASE IN CONFLICT WITH ANY DECISION OF THE UNITED STATES SUPREME COURT?

IV.

WAS THE COURT OF APPEALS CORRECT IN DETERMINING THAT RESPONDENTS WERE ENTITLED TO JUDGMENT AS A MATTER OF LAW?

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together with attorney fees. Petitioner's post-trial motion for reinstatement was denied.

The Court of Appeals for the Sixth Circuit reversed the judgment against Respondents, Asman and Van Damme, holding that Respondents were entitled to a directed verdict on the § 1983 due process claim. Plaintiff's Motion for Rehearing En Banc was denied.

COUNTER-STATEMENT OF FACTS

Petitioner, Jack R. Cremeans, joined the Roseville Police Department on May 1, 1967. (R 8-19-85, p 54). Cremeans had a long history of knee problems, going back to his high school football days. (R 8-19-85, p 170). A knee injury suffered while a member of the Air Force resulted in a medical discharge. *Id.*

During November of 1978, Cremeans injured his right knee in an accident on the premises of a boat supply company. (R 8-19-85, pp 86-87). Cremeans slipped and fell while walking along a darkened corridor. He missed several months of work and was compelled to undergo surgical treatment. (R 8-19-85, pp 87-91). Cremeans subsequently filed a lawsuit against the boat company, claiming, *inter alia*, wage loss and loss of wage-earning capacity. (R 8-19-85, p 173).

On January 7, 1981, a hearing of the Roseville Retirement Board was convened; present were Asman, Van Damme, Spybrook and Haggerty, four members of the 5-member retirement board. The fifth member of the board was not present and did not participate in the hearing. At that hearing, Petitioner was given an involuntary non-duty related medical retirement. The events preceding the retirement hearing, and details concerning the hearing itself, will be presented later.

This lawsuit was an unfortunate by-product of the medical retirement.

The proper focus here is upon the events which occurred during the fall of 1980 and early winter of 1981. On September 10, 1980, Cremeans underwent knee surgery. (R 8-19-85, p 94). He was absent from work from that date until October 1, 1980. (R 8-26-85, p 121). As Chief of Police, Asman was required to request that Cremeans produce a letter from a physician indicating that he was capable of returning to work. *Id.* Cremeans was notified of Asman's request by his supervisor, Lieutenant Giberson. (R 8-19-85, p 94). Cremeans did not produce a doctor's note showing fitness to work as a police officer; instead, he produced a letter from Dr. O'Connor of the University of Michigan Hospital informing Cremeans that he should change jobs. (Defendants' Exhibit 12; R 8-19-85, pp 94-95; R 8-26-85, pp 75-76, 121).

On November 3rd or 4th, 1980, when Cremeans showed Asman the O'Connor letter, Asman explained to him the possible consequences of the letter and in what sequence those consequences would transpire. (R 8-26-85, pp 94-96, 123, 124). Specifically, Asman said:

> "Well, after I had asked some other questions, I explained to Mr. Cremeans that I would have to submit this to the City Manager and to the City Attorney to find out what was going to occur, and then I said there are certain things that could occur."
>
> "If, in fact, they feel that he — it could be directed to put him in for a medical retirement. If I did that then the Retirement Board would send him to a doctor to be evaluated and if the

> doctor found that he was, in fact, unable to perform the duties of a police officer, then, he could be medically retired and there would be a hearing to that effect."
>
> "That was — as I explained it, that was the scenario." (R 8-26-85, pp 123-124).

At the November meeting, Cremeans questioned Asman concerning the retirement procedure, but gave Asman no indication that he wished to contest it. (R 8-26-85, pp 97-98). In fact, Cremeans expressed doubts about the viability of his knee, similar to those he would later voice at the retirement hearing. (R 8-26-85, p 135).

Asman then sought the advice of the City Manager, who in turn requested an opinion from the City Attorney, Russell LaBarge. (R 8-26-85, p 124). After receiving the City Attorney's opinion, Asman petitioned the retirement board to consider a medical disability retirement for Cremeans. (R 8-20-85, p 120; R 8-26-85, p 126). Asman had the authority to do so under the Roseville City Charter. (R 8-20-85, pp 128-129).

Asman's request was brought before the retirement board during December of 1980. (R 8-26-85, pp 126-127). The board issued a directive that Cremeans receive a medical examination. (R 8-20-85, p 121; R 8-26-85, p 127). Asman notified Cremeans of the results of that meeting. (R 8-26-85, p 128). Cremeans expressed concern about the nature of the retirement, and the impact it could have on his lawsuit against the boat company. He indicated that if he were compelled to retire, it would increase the award he could obtain in his slip-and-fall litigation. (R 8-26-85, p 129).

Pursuant to the retirement board's directive, Cremeans was examined by Dr. Wilson of the Detroit Industrial

Clinic. Wilson's report reached a conclusion unfavorable as to Cremeans' ability to perform his job as a police officer. Asman received a copy of that report on January 6, 1981. (R 8-26-85, p 127).

Cremeans was on patrol that afternoon and at approximately 2:30 or 3:00 p.m. he was notified that Chief Asman wanted to see him. (R 8-19-85, pp 97-98; R 8-26-85, p 78). While Cremeans was at the police station, he spoke with Officer Powell, President of the Police Officer's Union. (R 8-19-85, pp 99-100). Powell informed him that a retirement hearing would be held the following evening, January 7, 1981, at 6:00 p.m. *Id.* It was then about 4:00 p.m.; Cremeans had, therefore, by his own admission, about 26 hours' notice.

Only four of the five retirement board members were present at the January 7, 1981, retirement hearing. (R 8-20-85, p 119). The best evidence of what transpired at this meeting was the tape recording which was admitted into evidence and played to the jury. (R 8-26-85, pp 4-33). At the hearing, Cremeans was invited to make a statement, and did so. He indicated that he had not requested a retirement, that he had only one day's notice of the hearing, and that he had not had an opportunity to consult with an attorney. (R 8-26-85, pp 18-19). However, Cremeans was offered an opportunity to have the matter tabled, and declined to do so. (R 8-26-85, p 22). Twice Cremeans indicated to the panel that he had serious doubts about his ability to perform the job of a police officer, and that he could jeopardize his own safety, or that of a citizen or fellow officer. (R 8-26-85, pp 21-22, 28-29). Cremeans was given a non-duty disability retirement. (R 8-26-85, p 32). The retirement board's vote was unanimous. The individual members testified that they considered not only the Wilson

report and the O'Connor letter, but the testimony of Jack Cremeans himself.

At the hearing, Cremeans was advised that he could petition the retirement board for reinstatement, if he could demonstrate that he had regained his ability to do his job. (R 8-26-85, p 31). Cremeans never applied for reinstatement. (R 8-19-85, p 163). Indeed, no doctor ever presented to Cremeans any written evidence that he could go back to work as a police officer. (R 8-19-85, pp 164-165).

Before this case went to the jury, Petitioner's claims had been reduced to these:

(1) Civil rights violations as to Asman, Van Damme, Spybrook and Haggerty, and

(2) Intentional infliction of mental distress as to Asman and the City of Roseville.

Petitioner's allegations of intentional infliction of mental distress against Spybrook and Haggerty were dismissed by the Court. The jury no-caused these allegations as to Asman and Van Damme. Petitioner dropped his constructive discharge allegation. Petitioner's civil rights allegations against the City of Roseville were dismissed. The Roseville Retirement Board and Police Department were adjudged part of the City, so the claims against these parties also fell by the wayside.

None of the evidence discussed above was controverted, save for the issue of Asman's animosity. Yet, in the face of this evidence, a jury found that Asman and Van Damme had violated Cremeans' right to procedural due process, and awarded Cremeans a substantial sum in compensatory and punitive damages. Respondents had moved unsuccessfully for a directed

verdict, arguing, *inter alia*, that the evidence was legally insufficient to submit the due process issue to a jury. Respondents then moved for a judgment notwithstanding the verdict, or, in the alternative, a new trial.

The trial court denied the Respondents' post-trial motions, and they took an appeal from the adverse judgment. Petitioner cross-appealed, principally because of the trial court's denial of his equitable claim for reinstatement. The Sixth Circuit Court of Appeals reversed the judgment of the trial court, finding that Respondents were entitled to summary disposition on the issue of violation of procedural due process. The Court of Appeals also denied Petitioner's cross-appeal. Petitioner's Motion for Rehearing was denied. Other facts of record relevant to the issues raised in Petitioner's Petition for Writ of Certiorari will be addressed in the argument portion of this response to the Petition.

PETITIONER'S REASONS FOR GRANTING THE PETITION

The question of what process is due a public employee entitled to 14th Amendment due process guarantees is hardly one of first impression, as Petitioner arcanely characterizes it. In fact, this Court has been active in defining the limits of procedural due process during the last half century. *See notably, Mullane* v *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313; 70 S. Ct. 652; 94 L. Ed. 865 (1950); *Mathews* v *Eldridge*, 424 U.S. 319; 96 S. Ct. 893; 47 L. Ed. 2d 18 (1976).

More particular guidance on this issue was recently supplied in *Cleveland Board of Education* v *Loudermill*, 470 U.S. 532; 105 S. Ct. 1487; 84 L. Ed. 2d 494 (1985), which described the type of abbreviated pre-action hearing appropriate to cases involving termination of employment. Although this case, in contrast, involves the lesser private interest of medical retirement, the *Louder-*

mill decision provides lower courts with all the authority and guidance they need to analyze due process claims of the type advanced by Petitioner.

Further, the Sixth Circuit has issued opinions which provide guidance in this area. *See Lee* v *Western Reserve Psychiatric Habilitation Center*, 747 F 2d 1062 (CA 6, 1984); *Duchesne* v *Williams*, 849 F 2d 1004 (CA 6, 1988). The Court relied most conspicuously upon *Loudermill* and *Duchesne* in deciding the instant case. *Cremeans* v *City of Roseville*, 861 F 2d 878 (CA 6, 1988). Petitioner describes *Duchesne* as "a flawed opinion" and notes that it is the subject of a Petition for Certiorari. However, the Clerk of this Court has informed Respondents that this Petition was denied by Order dated March 20, 1989.

The decision of the Court of Appeals in the instant case is not in conflict with any "sham hearing" case of this Court or another Circuit Court. Petitioner's problem was that the facts of record are grossly insufficient to make out a jury-submissible case of due process violation, under a "sham hearing" theory or otherwise.

REASONS FOR DENYING THE WRIT

I.

AS A MATTER OF LAW PLAINTIFF FAILED TO PRESENT SUFFICIENT EVIDENCE TO CREATE A JURY QUESTION THAT HIS RIGHT TO PROCEDURAL DUE PROCESS WAS VIOLATED, BY MEANS OF A "SHAM HEARING" OR OTHERWISE.

The issue in this case was whether Petitioner's due process rights were violated when he was given a non-

duty disability retirement by the Roseville Retirement Board. The factual references by Petitioner on appeal are grossly incomplete, argumentative and misleading, and on occasion incapable of support on the record. Upon thorough examination of the entire record, the 6th Circuit Court of Appeals was easily able to conclude that Petitioner had no due process claim as a matter of law.

Petitioner agrees that the essence of due process is notice and the opportunity to be heard. Petitioner had notice, not just twenty-six (26) hours' notice of the actual retirement board hearing, but notice two (2) months prior to the hearing that retirement proceedings had been set in motion. Petitioner also had the opportunity to speak at his retirement proceedings, and also had a union representative present to speak for him. Among other things, Petitioner said this: "I'll be very honest with you. The knee is bad. From what the doctors' opinions I have talked and I have seen four to five specialists. It's not going to get any better even with my therapy program I am involved in and there is doubts as to my main concern as I really honestly feel like I might jeopardize my own being more so, or I might be out there and jeopardize another officer or a citizen." (App. 13).

The Board also had before it the medical report of Dr. Wilson, the retirement boards' medical director, which indicated, "In view of the presence of these problems and the possible circumstances I have noted, I would have serious doubts as to Mr. Cremeans' physical ability to continue to perform as a patrolman." (R 8-26-

85, p 16). The retirement board also considered the letter from Dr. O'Connor which Cremeans himself had given to Chief Asman, which letter indicated that Mr. Cremeans should change occupations. (R 8-26-85, p 20).

Thus one of the more serious problems with the Petitioner's case was the fact that the sole purpose of the retirement hearing was to determine whether or not Petitioner could continue to work as a police officer, and all of the medical evidence corroborated by Petitioner's own statements at the hearing, indicated that he could not.

The abject weakness of Petitioner's position was reflected in the manner in which his case was prosecuted. Petitioner attempted to exclude all medical reports and evaluations on the grounds that their conclusions were not authored in the precise terms used in the City charter's involuntary retirement provision. The trial court properly rebuffed this effort. During cross-examination of Van Damme, Petitioner's attorney attempted to get the witness to admit that he should not have considered Cremeans' own statements at the retirement hearing, for the reason that Cremeans was not qualified to render an opinion as to his medical condition. (R 8-26-85, pp 37-41). The irony of this trial posture is self-evident, given that the gravamen of Petitioner's civil rights complaint was that he was not afforded an opportunity to be heard.

There can be little doubt that Petitioner had sufficient notice and an opportunity to be heard under the circumstances of this case, a point which will be addressed in detail later in this brief. Here, Respondents will examine Petitioner's argument that the retirement hearing was a sham, an argument which Petitioner did not press with any significant amount of force until the appellate stage of this litigation.

Before the Circuit Court, and in this Court, Petitioner paints a picture of a hateful Chief Asman ramming through a retirement while the rest of the retirement board did not understand the situation and, impliedly, were incapable of making a proper evaluation. This scenario is in sharp contrast to the record.

Petitioner introduced at trial evidence purporting to show that Police Chief Thomas Asman bore a grudge against Petitioner, due to certain events which had transpired in the past. (R 8-19-85, pp 56-84). This testimony was controverted by that of Asman. (R 8-26-85, pp 139-158). But absent from the record was any evidence that this alleged "ill-will" colored Asman's conduct as a member of the Roseville Retirement Board. All the testimony demonstrates is that Asman initiated the retirement process, as any retirement board member is empowered to do under the charter. Under Petitioner's analysis, any board member who invoked the charter provision and initiated a medical retirement should be disqualified from participation at the hearing because of bias. However, this runs contrary to the holding of the court in *Duchesne* v *Williams*, 849 F 2d 1004 (CA 6, 1988). Further, the record fully supports Asman's actions in seeking a retirement hearing.

Again, Petitioner suffered a debilitating knee injury for which he filed a lawsuit alleging reduced wage-earning capacity. Although Petitioner missed several months of work, Asman took no action to seek his retirement at that time. On September 10, 1980, however, Petitioner underwent knee surgery, and was absent from work for several more weeks. At that time, Asman, as Chief of Police, was compelled to request that Cremeans produce a letter from a physician indicating he was capable of returning to work. (R 8-26-85 p 121). Cremeans did indeed produce a letter from a physician, but the

letter informed Cremeans that he should change jobs. It was at that time, during early November of 1980, that Asman explained to Cremeans that a medical evaluation and subsequent retirement hearing might be held. Cremeans saw Dr. Wilson, the Board's medical examiner, during December of 1980. When Asman got Wilson's report, he now had strong indications from two physicians that Cremeans was not capable of performing as a police officer. Asman then acted with dispatch to set up a retirement hearing.

Plaintiff's knee injury was *real*, and Plaintiff's theory that it was only the pretext Asman had been waiting for to get rid of Cremeans is pure folly.

Even assuming that Asman harbored dark motives, and that these motives affected his participation in Petitioner's retirement, Petitioner still fell far short of establishing a prima facie case that the hearing was a sham. Asman was but one member of a five member retirement board, four members of which sat during the hearing at which Petitioner was retired. The remaining board members were Van Damme, Spybrook and Haggerty. The unsupported assertions of Petitioner on appeal that Van Damme may have entered into a conspiracy with Asman to retire Petitioner must be ignored. There is not a shred of evidence in the record that Van Damme harbored any personal or professional animosity towards Petitioner. Indeed, it was Van Damme who, at the retirement hearing, informed Petitioner that he had the right to come back before the retirement board at any time to ask for reinstatement, upon demonstrating that he was capable of working as a police officer. With regard to Haggerty and Spybrook, Petitioner suggests only that they were confused and might have been under the assumption that Petitioner himself brought the matter before the board. None of this is true. At the

time of the retirement hearing both Cremeans and his representative, William Powell, clearly informed the retirement board that Cremeans had not requested the disability retirement. (R 8-26-85, pp 20, 25-26). Thus, none of the board members were under any misimpression that Petitioner had requested the retirement prior to the vote being taken. The deposition testimony of Haggerty and Spybrook was read into the trial record. Both witnesses indicated that they did not know who had requested the retirement, and Haggerty indicated that it would not have made any difference who made the request. The testimony of both witnesses indicates that they were keenly aware of the issue before the board.

Thus, giving Petitioner the benefit of the doubt on any testimonial dispute, Petitioner could still not demonstrate a sham hearing. Petitioner could produce evidence from which it might be inferred that Asman was biased against him, but Asman was only one member of the board, and three votes were required for retirement. The vote, in fact, was unanimous. Compare *Chicago Cable Communications* v *Chicago Cable Commission*, 678 F Supp 734 (ND Ill, 1988), where possible bias on the part of the chairperson could constitute no due process violation where the remaining commissioners all seemed conscientious and fair.

Petitioner further maintains that the board did not follow City charter requirements governing the award of a disability retirement, a contention which is both inaccurate and irrelevant. It is irrelevant, because governmental procedures prior to adverse action do not define what process is due under the Federal Constitution. *Cleveland Board of Education* v *Loudermill*, 470 U.S. 532; 105 S. Ct. 1487; 84 L. Ed. 2d 494 (1985). It is

inaccurate, because the record indicates that the charter provisions were indeed followed.

There is no dispute that Cremeans' retirement was initiated by his department head, Chief Asman. Further, the medical director did produce a report to the retirement board indicating that Cremeans could no longer function as a police officer. Plaintiff's argument that the charter was violated is based principally on the fact that Wilson's report does not use the *exact language* employed in the charter provision. (R 8-20-85, p 34). However, based upon interpretations of the charter provision made by the City attorney, Van Damme concluded that the medical report was sufficient to meet the charter requirements. (R 8-20-85, pp 24-25, 27-28, 140).

In this case, the Court of Appeals found an absence of proof that the proceeding was a sham, and found in fact that the proceeding met all of the due process requirements for a pre-termination hearing set forth in *Loudermill* and *Duchesne*.

In the remainder of this argument, Petitioner maintains that the Court of Appeals erred in finding that Petitioner had state law remedies which he did not pursue. However, as the quotation from the Court of Appeals' opinion set forth below illustrates, this question was not determinative of the outcome of the appeal:

> "The theory upon which Cremeans' § 1983 Complaint was submitted to the jury was that the individual board members deprived him of his constitutional right to due process. We are not concerned with determining whether the procedure involved strictly complied with state law. There was a state law remedy for such a

> violation which Cremeans chose to forego. A state is allowed to provide more elaborate protection of employees' rights that is provided by the federal law and the Constitution. What we are concerned with here is the question of whether Cremeans received constitutionally adequate process when he was placed on involuntary nonduty medical disability retirement." *Cremeans, supra*, p 882.

At any rate, Petitioner's argument, that no post-deprivation remedy existed is incorrect. It is unclear whether the Court of Appeals determined that MCL 38.514, providing for direct appeal to the Circuit Court, applied in this case. If it did, then Petitioner must assume some of the blame, because Petitioner's Complaint relied upon MCL 38.501-38.518 for the contention that Petitioner had a property right in continued employment. Petitioner made no effort prior to his Motion for Rehearing in the Court of Appeals to assert his belief that not all of these provisions, of which MCL 38.514 was a part, applied. Moreover, both parties agree that MCL 38.555, providing that the retirement board shall be a quasi-judicial body whose actions shall be reviewable by Writ of Certiorari (now superintending control), applies to this case. Despite Petitioner's remonstrations to the contrary, this tool for review of retirement board decisions has vitality. *See, e.g., O'Connell* v *Dearborn Pension Board*, 334 Mich 208 (1952), where a grant of mandamus relief was affirmed. Even if Petitioner's ability to review the board hearing were limited to questions of law, as Petitioner maintains it would be, Petitioner's contention that the board violated the charter provisions relating to involuntary retirement would be such a question of law.

More fundamentally, this is not the type of case where the absence of elaborate post-action review proceedings would render abbreviated, *Loudermill*-style pre-action proceedings inappropriate. Unlike cases involving termination of employment, this case involved involuntary medical retirement. The former is necessarily permanent, and the latter is not. *See* MCL 38.556(f) providing for periodic medical examination of retired employees. This section provides that the board shall, on a retired member's application, have him undergo a physical examination. If the physician reports to the board that the member is physicially able to resume employment, he shall, under this section, be restored to active service. Note that during the course of the retirement hearing, Van Damme explained to Petitioner that he had a right at any time to come back to the board and seek reinstatement, upon demonstrating that his knees were in such a condition that would allow him to perform the duties of a police officer.

II.

THE DECISION IN THE INSTANT CASE IS NOT IN CONFLICT WITH A DECISION OF THE 7TH CIRCUIT COURT OF APPEALS, NOR WOULD IT MATTER IF IT WERE.

Petitioner implies that the Court of Appeals' decision is in conflict with *Ciechon* v *City of Chicago*, 686 F 2d 511 (CA 7, 1982), though Petitioner never reveals the exact nature of this conflict. Further, Petitioner does not explain why this relevation, if considered acceptable, would warrant grant of a Petition for Certiorari by this Court.

An examination of the *Ciechon* decision does not yield a foundation for the conclusion that there is any legal conflict between *Ciechon* and this case, and the facts of the two cases are erratically different. *Ciechon*

is a real horror story. There, the Plaintiff was a paramedic with the Chicago Fire Department. She was discharged by the City following an incident in which a patient died shortly after being visited by her ambulance crew. The patient's family complained bitterly to City officials and the media concerning the ambulance crew's performance.

In determining that the Plaintiff had been unfairly given the bum's rush by the City, the Court of Appeals found that the City had panicked under pressure from the media and a vengence-seeking family, leading to a decision to discharge Plaintiff in order to defuse the situation.

It is quite clear that the *Ciechon* Court believed Plaintiff was responsible for no malfeasance that would have warranted discharge. *Ciechon* also found it intolerable that Plaintiff was singled out for discharge, when she bore no more responsibility for what happened than did anyone else on the ambulance crew.

Ciechon finds no analogy here. The Roseville Retirement Board met to consider the question of whether Petitioner was capable of functioning as a police officer in the wake of his slip and fall injury and subsequent operation. All the available evidence, including Petitioner's own statements at the hearing, indicated that he was not. Compare *Ciechon*, in which the record did not justify the action taken against Plaintiff. Unlike *Ciechon*, the board that retired Petitioner in this case was not permeated with bias or improper motive. Again, Petitioner had some evidence that only one member of the board, Chief Asman, may have disliked him. Yet, three votes were required to retire Petitioner, and there was no evidence of bias or improper motive on the part of the remaining sitting members.

Other cases cited by Petitioner in this section are likewise easily distinguished. In *Bhargave* v *Cloer*, 355 F Supp 1143 (ND Ga, 1972), Plaintiff, a probationary teacher, was dismissed in the middle of her contract. Yet the board of education had already met and decided to terminate the Plaintiff's contract before the hearing requested by the Plaintiff was held. The court found that the hearing was not meaningful, since the harm which the hearing was designed to prevent had already occurred. Thus, the court in *Bhargave* did not even reach the issue of the Plaintiff's entitlement to an impartial tribunal. In the instant case, Haggerty and Spybrook testified that the members of the board did not even discuss Cremeans' retirement prior to the hearing.

Petitioner also cites *Salisbury* v *Housing Authority of Newport*, 615 F Supp 1433 (DC Ky, 1985). There the court held that the Plaintiff was deprived of her due process right to an impartial decision maker when she was terminated as director of the Newport Housing Authority. In that case, however, there was apparently a bitter personal dispute between the Plaintiff and all of the housing authority members. Additionally, the members had pecuniary and personal interests in seeing the termination upheld, because of pending and possible future litigation. *Salisbury* is thus also far afield from the facts of this case.

Petitioner's "sham proceedings" argument is nothing more than a desperate attempt to avoid the abundant authorities holding that the procedures employed by the board in this case were quite sufficient to ensure procedural due process. Petitioner had notice of the hearing and an opportunity to be heard. What Petitioner said when he was heard, combined with the medical evidence, virtually guaranteed his retirement without regard to who was sitting on the board.

III.

THE DECISION IN THE INSTANT CASE IS NOT IN CONFLICT WITH ANY DECISION OF THE UNITED STATES SUPREME COURT.

Answering this issue is difficult, because Petitioner never explains the nature of the conflict which allegedly exists between the lower court opinion in this case and any particular decision of the Supreme Court. Contrary to Petitioner's assertion, the Court of Appeals did indeed recognize that the question of what process is due depends upon the balancing of competing interests, in deference to this Court's opinion in *Cleveland Board of Education* v *Loudermill*, 470 U.S. 532; 105 S. Ct. 1487; 84 L. Ed. 2d 494 (1985). The court below clearly found that Petitioner had been afforded an adequate pretermination hearing when measured against *Loudermill*'s benchmark. There was no need for the Court of Appeals to engage in an elaborate discussion of each factor to be included in the balance, because this was simply not a close case. A more detailed analysis of the competing factors only serves to strengthen the result reached by the Court of Appeals.

Procedural due process mandates that an individual be given "notice and opportunity for hearing appropriate to the nature of the case". *Mullane* v *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313; 70 S. Ct. 652; 94 L. Ed. 865 (1950). The notice must be "reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections . . . and it must afford a reasonable time for those interested to make their appearance . . . [I]f . . . those conditions are reasonably met, the constitutional requirements are satisfied." *Mullane, supra,* pp 314-315.

As the *Mullane* decision suggests, procedural due process is a flexible concept which depends upon a balancing of competing interests. The elements to be considered were set forth in *Mathews* v *Eldridge*, 424 U.S. 319; 96 S. Ct. 893, 903; 47 L. Ed. 2d 18 (1976):

> "Our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Logically, if the first two factors are of substantial weight, but the third is not, the full panoply of due process protections would be implicated. However, where a strong showing is not made on the first two factors, but is as to the third, a hearing prior to adverse administrative action could be substantially abbreviated. In this case, the balance of factors is such that Plaintiff was afforded more procedural protection than due process would require.

Defendants will first examine the strength of the private interest involved. Describing the private interest of the litigant in cases involving *termination* of employment, the Supreme Court has said:

> "First, the significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood . . .

> While a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job." *Cleveland Board of Education* v *Loudermill*, 470 U.S. 532; 105 S. Ct. 1487; 84 L. Ed. 2d 494 (1985).

In contrast, this case involves not a termination of employment but rather an involuntary medical retirement. The difference in these two situations is analogous to the distinction between the interests of a welfare recipient and those of a recipient of social security disability benefits. In *Goldberg* v *Kelley*, 397 U.S. 254; 90 S. Ct. 1011; 25 L. Ed. 2d 287 (1970), the high Court held that an evidentiary pre-termination hearing was required prior to temporary deprivation of welfare benefits. In doing so, the Court emphasized the strength of the private interest involved: "[T]ermination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits." 90 S. Ct. at 1018. But six years later in *Mathews*, the Court declined to extend this protection to persons facing discontinuation of disability benefits under the Social Security Act.

The distinction drawn by the *Mathews* Court is analytically helpful. *Mathews* observed that although the hardship on a disabled worker deprived of benefits could be significant, the worker's need was likely to be less than that of a welfare recipient. The Court rendered this explanation: "In addition to the possibility of access to private resources, other forms of government assistance will become available where the termination of disability benefits places a worker or his family below the subsistence level." 96 S. Ct. at 905 (Citation

and Footnote omitted). The *Mathews* Court then stated:

> "In view of these potential sources of temporary income, there is less reason here than in *Goldberg* to depart from the ordinary principal [*sic*], established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action." 96 S. Ct. at 906.

In our case, Petitioner's medical retirement entitled him to non-duty disability retirement benefits. Further, the injury which caused Petitioner to be retired made him eligible for worker's compensation benefits. The fired employee gets none of this. Also, the prospect of other employment is not so drastically affected by a medical retirement as it would be by termination. The retirement would certainly reduce Petitioner's chances of obtaining employment elsewhere as a police officer, but would not affect his ability to obtain less strenuous employment, as a termination would. Also, since Petitioner could have petitioned for reinstatement at any time, the duration of his severance was not permanent, provided he could show he was capable of working. Unambiguously, the private interest of an employee facing involuntary medical retirement is not coextensive with that of an employee threatened with termination.

The second factor focuses on the risk of erroneous deprivation from the procedures used and the probable value of additional safeguards. This factor is of no assistance to Petitioner in the balance for several reasons. Initially, the pivotal inquiry in a medical retirement is whether the employee is physically capable of doing his or her job. This determination is predicated to a greater extent on objective factors than is the determination of

whether an employee should be fired for cause. This being the case, the argument for more stringent due process protections is attenuated. For support Defendants return to *Mathews*, where a determination of medical disability was also at issue. The decision to discontinue disability benefits, the *Mathews* Court observed, would normally turn upon "routine, standard, and unbiased reports by physician specialists" concerning a subject which they have personally examined. 96 S. Ct. at 906, quoting *Richardson* v *Perales*, 402 U.S. 389; 91 S. Ct. 1420, 1428; 28 L. Ed. 2d 842 (1971). For this reason witness credibility and veracity are not typically a problem, so the "potential value of an evidentiary hearing, or even oral presentation to the decision maker, is substantially less in this context than in *Goldberg*. *Mathews, supra*.

The fact that an evidentiary hearing with a right of cross-examination and representation by counsel was not required in disability retirement cases was recognized even prior to the *Mathews* decision. *Siletti* v *New York City Employees' Retirement System*, 401 F Supp 162 (SD NY, 1975), *aff'd without op*, 556 F 2d 559 (CA 2, 1977). Compare *Madera* v *Board of Education of City of New York*, 386 F 2d 778, 785 (CA 2, 1967), *cert den*, 390 U.S. 1028; 88 S. Ct. 1416; 20 L. Ed. 2d 284 (1968).

In *Kabelka* v *City of New York*, 353 F Supp 7 (SD NY, 1973), a municipal fireman challenged the procedures by which he was awarded a non-duty disability retirement, claiming that he should have been allowed representation of counsel and the opportunity to cross-examine medical witnesses. The court rejected both claims. More specifically, the court determined that counsel would not have been of any value to plaintiff in a meeting, the function of which was to review medical

findings and determine plaintiff's disability status. *Kabelka, supra,* p 9.

In *Siletti, supra,* the court more closely analyzed the issue of confrontation of witnesses in the disability retirement context. There the plaintiff had relied upon *Goldberg* v *Kelley,* 397 U.S. 254; 90 S. Ct. 1011; 25 L. Ed. 2d 287 (1970), the welfare termination proceedings case, in which the court stated that on most occasions where factual questions are presented, "due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg, supra,* 397 U.S. at 269. The *Siletti* Court found this principle to be without application in the disability retirement context:

> "In the case at hand, by contrast, the questions of credibility and lack of veracity by medical witnesses are not likely to arise. Indeed, although the plaintiff disputes the medical and factual conclusions reached by the defendant, he has not challenged the medical fact finder's credibility or fairness. In the absence of questions of credibility, other than the usual conflicting opinions of opposing medical experts, the plaintiff's interest in cross-examination is minimal." *Siletti, supra,* p 167.

In this particular case, any risk of error in the proceedings was reduced to insignificance for another very fundamental reason — plaintiff admitted that he had serious doubts about his ability to perform as a police officer. At the January 7, 1981 retirement hearing, Jack Cremeans told the board:

> "I'll be very honest with you. The knee is bad. From what the doctor's opinions I've talked and I've seen four to five specialists. It's not gonna get any better even with my therapy program I'm

> involved in and there's doubts as to my main concern is I really honestly feel like I might jeopardize my own physical being more so or I might be out there and jeopardize another officer or a citizen."

In two Federal District Court cases, the Plaintiff made admissions which similarly went to the heart of the subject matter of the administrative action, prior to that action. *Hayes* v *City of Wilmington*, 451 F Supp 696 (D Del, 1978); *Behan* v *City of Dover*, 419 F Supp 562 (D Del, 1976). In both cases it was held that abbreviated procedures did not create a significant risk of error in light of those admissions.

In this case, Petitioner's own statement corroborated the medical conclusions of Dr. Wilson, the retirement board's medical examiner. Dr. Wilson's report concluded that "in view of the presence of these problems and the possible circumstances I have noted, I would have serious doubts as to Mr. Cremeans' physical ability to continue to perform as a patrolman." One wonders, therefore, how enhanced due process protection would have decreased the risk of an erroneous deprivation in this case.

The final factor to be examined in determining the due process balance is the public interest, and the Supreme Court has held that the governmental interest in being able to act expeditiously to remove an unsatisfactory employee is substantial. *Arnett* v *Kennedy*, 416 U.S. 134; 94 S. Ct. 1633, 1651; 40 L. Ed. 2d 15 (1974). Not surprisingly, this interest is particularly acute where the employer is charged with protection of the public safety. In *Hayes*, where the governmental employer was a fire department, the employee was suspended for, among other things, showing up over five hours late to work. The *Hayes* Court expressed the

strength of the public interest involved in the following language:

> "On the other side of the scale, Defendant Bureau of Fire is charged with the responsibility of protecting the lives and property of the citizens of the City of Wilmington. To discharge its duty effectively, the bureau of fire must be able to depend on its fire fighters being at their duty stations at the assigned times or, at the very least, notifying their superiors when they cannot report. Thus, Defendants' interest is a weighty one disserved by a requirement of elaborate pre-suspension procedures or the payment of wages to misbehaving employees." *Hayes, supra,* pp 709-710 (Footnote omitted).

Similarly, a municipal police department has an obligation to protect public property and safety, and therefore, has a strong interest in being able to ensure that police officers no longer capable of performing their jobs for physical reasons can be retired without an elaborate retirement proceeding.

In review, Respondents would afford moderate weight to the first factor involving Petitioner's private interest, virtually no weight at all to the second factor involving risk of erroneous deprivation and the possibility that enhanced due process protections would reduce that risk, and great weight to the third factor, public interest. Given this balance, if due process required a pre-action oral confrontation or an opportunity to be heard at all, it would require at best an abbreviated hearing at which the Petitioner was afforded an opportunity to give his side of the story.

Petitioner had notice of the hearing at which he was retired, sufficient to ensure his presence. Board member

Haggerty offered him the opportunity to have the matter tabled, which should eliminate any concern about the extent of prior notice. Petitioner had the opportunity to be heard and he was heard. Where the government interest is so strong, and the private interest is at considerably less than full strength, the hearing provided in this case was all that due process required. Compare *Lee* v *Western Reserve Psychiatric Habilitation Center*, 747 F 2d 1062 (CA 6, 1984). In that case, the Plaintiff was *discharged* at an abbreviated hearing held on 24 hours' notice, where the Plaintiff was not given the opportunity to call and cross-examine witnesses, or to be represented by counsel.

Interestingly, Petitioner does not even suggest what additional protection should have been given Petitioner at the retirement hearing, or how such additional protections could have made a difference in the result of the hearing. In fact, where the medical evidence together with Petitioner's own admissions so strongly warrants medical retirement, one is given to wonder what additional protections could have made any difference in the outcome.

IV.

THE COURT OF APPEALS WAS CLEARLY CORRECT IN DETERMINING THAT RESPONDENTS WERE ENTITLED TO JUDGMENT AS A MATTER OF LAW.

Respondents have already set forth the evidence presented by Petitioner, and demonstrated how that evidence was manifestly insufficient to make out a prima facie case for a violation of due process. This analysis need not be repeated here.

This was a case that never should have been filed in the first place. The real tragedy of this matter is that

despite diligent and repeated efforts by Respondents to have this case thrown out of court, the trial court permitted it to go to a jury. This was an error of law.

The determination of whether a directed verdict should have been granted is one that requires the reviewing court to sift through the trial record and determine whether Petitioner had a prima facie case. It is not, according to Respondent's understanding, the station of this Court to perform such a task. At any rate, the issue was thoroughly briefed and argued in the Court of Appeals, and the record should reflect that that court put a considerable amount of time and effort into the task. That court's determination should stand undisturbed.

RELIEF REQUESTED

WHEREFORE, Respondents pray that this Honorable Court deny the Petition for Certiorari.

Respectfully submitted,

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